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If Men Were Angels

by Bruce Fein

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The Founding Fathers would be alarmed by President George W. Bush's "trust me" defense for collecting foreign intelligence in violation of the Foreign Intelligence Surveillance Act (FISA) and the Constitution's separation of powers.

The president insists that the National Security Agency (NSA) has been confined to spying on American citizens who are "known" al Qaeda sympathizers or collaborators. Mr. Bush avows that he knows the eavesdropping targets are implicated in terrorism because his subordinates have said so; and, they are honorable men and women with no interest in persecuting or harassing the innocent. Presidential infallibility and angelic motives should be taken on faith alone, like a belief in salvation.

But the Founding Fathers fashioned sterner stuff to protect individual liberties and to forestall government oppression, i.e., a separation of powers between the legislative, executive and judicial branches. James Madison elaborated in Federalist 51: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices are necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

The separation of powers does not guarantee against government overreaching in wartime or otherwise. Congress, the president and the Supreme Court may all succumb to exaggerated fears or prejudices. Thus, Japanese Americans were held in concentration camps during World War II with the approval of all three branches. But requiring a consensus militates in favor of measured and balanced war policies. The commander in chief is inclined to inflate claims of military necessity, as the Japanese American injustice exemplifies.

Approximately 112,000 were evacuated to concentration camps to thwart sabotage or espionage on the West Coast. President Franklin D. Roosevelt, acting through commanding Gen. John L. DeWitt, maintained that Japanese ancestry, simpliciter, made them suspect. DeWitt relied on racist thinking outside the domain of military expertise.

In his Final Report on the evacuation from the Pacific Coast area, the commanding general refers to individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies." But he summoned no plausible evidence to support the indictment. During the nearly four months that elapsed between Pearl Harbor and the concentration camps, not a single person of Japanese ancestry was either accused or convicted of espionage or sabotage. Enlisting the "Who stole the tarts" precedent in Alice in Wonderland, DeWitt obtusely maintained that unwavering loyalty proved imminent treason: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

It was said that case-by-case vetting of Japanese Americans for disloyalty was infeasible. But it was done for persons of German and Italian ancestry. The British government established tribunals to determine the loyalties of 74,000 German and Austrian aliens. Approximately 64,000 were freed from internment and from any special restrictions.

The maltreatment of Japanese Americans probably impaired the war effort. Despite the concentration camps, 33,000 served in the United States military. The famed 100th Battalion earned 900 Purple Hearts fighting its way through Italy. A greater number would have joined the armed forces if they not been wrongly suspected and degraded.

Like Roosevelt and DeWitt, President Bush claims military necessity for the NSA's eavesdropping on the international communications of Americans without adherence to FISA. The hope is to establish an early warning system to detect and prevent new editions of September 11, 2001. In a Dec. 22, 2005 letter to Congress, the Department of Justice asserted: "FISA could not have provided the speed and agility required for the early warning detection system. In addition, any legislative change . . . that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities."

But FISA crowns the president with electronic surveillance powers without a court warrant for 15 days after a congressional declaration of war. That duration could have been indefinitely extended by Congress without alerting terrorists to anything new. Further, Congress might have been asked to lower the threshold of suspicion required to

initiate surveillance without compromising intelligence sources or methods. Indeed, President Bush's continuation of the NSA's spying despite the disclosure by the New York Times discredits the argument that secrecy was indispensable to its effectiveness. On the other hand, congressional involvement in the early warning system would provide an outside check on whether the commander in chief is targeting only persons linked to al Qaeda or an affiliated terrorist organization.

To borrow from Justice Robert Jackson's dissent in Korematsu v. United States (1944), the chilling danger created by President Bush's claim of wartime omnipotence to justify the NSA's eavesdropping is that the precedent will lie around like a loaded weapon ready for the hand of the incumbent or any successor who would reduce Congress to an ink blot.

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…or outside the law?

By Bruce Fein

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President Bush secretly ordered the National Security Agency (NSA) to eavesdrop on the international communications of U.S. citizens in violation of the warrant requirement of the Foreign Intelligence Surveillance Act (FISA) in the aftermath of the September 11, 2001, abominations.

The eavesdropping continued for four years, long after fears of imminent September 11 repetitions had lapsed, before the disclosure by the New York Times this month.

Mr. Bush has continued the NSA spying without congressional authorization or ratification of the earlier interceptions. (In sharp contrast, Abraham Lincoln obtained congressional ratification for the emergency measures taken in the wake of Fort Sumter, including suspending the writ of habeas corpus).

Mr. Bush has adamantly refused to acknowledge any constitutional limitations on his power to wage war indefinitely against international terrorism, other than an unelaborated assertion he is not a dictator. Claims to inherent authority to break and enter homes, to intercept purely domestic communications, or to herd citizens into concentration camps reminiscent of World War II, for example, have not been ruled out if the commander in chief believes the measures would help defeat al Qaeda or sister terrorist threats.

Volumes of war powers nonsense have been assembled to defend Mr. Bush's defiance of the legislative branch and claim of wartime omnipotence so long as terrorism persists, i.e., in perpetuity. Congress should undertake a national inquest into his conduct and claims to determine whether impeachable usurpations are at hand. As Alexander Hamilton explained in Federalist 65, impeachment lies for "abuse or violation of some public trust," misbehaviors that "relate chiefly to injuries done immediately to the society itself."

The Founding Fathers confined presidential war powers to avoid the oppressions of kings. Despite championing a muscular and energetic chief executive, Hamilton in

Federalist 69 accepted that the president must generally bow to congressional directions even in times of war: "The president is to be commander in chief of the Army and Navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces; while that of the British king extends to declaring war and to the raising and regulating of fleets and armies -- all which, by the Constitution under consideration, would appertain to the legislature."

President Bush's claim of inherent authority to flout congressional limitations in warring against international terrorism thus stumbles on the original meaning of the commander in chief provision in Article II, section 2.

The claim is not established by the fact that many of Mr. Bush's predecessors have made comparable assertions. In Youngstown Sheet & Tube v. Sawyer (1952), the U.S. Supreme Court rejected President Truman's claim of inherent power to seize a steel mill to settle a labor dispute during the Korean War in reliance on previous seizures of private businesses by other presidents. Writing for a 6-3 majority, Justice Hugo Black amplified: "But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested in the Constitution in the Government of the United States."

Indeed, no unconstitutional usurpation is saved by longevity. For 50 years, Congress claimed power to thwart executive decisions through "legislative vetoes." The Supreme Court, nevertheless, held the practice void in Immigration and Naturalization Service v. Chadha (1983). Approximately 200 laws were set aside. Similarly, the high

court declared in Erie Railroad v. Tompkins (1938) that federal courts for a century since Swift v. Tyson (1842) had unconstitutionally exceeded their adjudicative powers in fashioning a federal common law to decide disputes between citizens of different states.

President Bush preposterously argues the Sept. 14, 2001, congressional resolution authorizing "all necessary and appropriate force against those nations, organizations or persons [the president] determines" were implicated in the September 11 attacks provided legal sanction for the indefinite NSA eavesdropping outside the aegis of FISA. But the FISA statute expressly limits emergency surveillances of citizens during wartime to 15 days, unless the president obtains congressional approval for an extension: "[T]he president, through the attorney general, may authorize electronic surveillance without a court order... to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress."

A cardinal canon of statutory interpretation teaches that a specific statute like FISA trumps a general statute like the congressional war resolution. Neither the resolution's language nor legislative history even hints that Congress intended a repeal of FISA. Moreover, the White House has maintained Congress was not asked for a law authorizing the NSA eavesdropping because the legislature would have balked, not because the statute would have duplicated the war resolution.

As Youngstown Sheet & Tube instructs, the war powers of the president are at their nadir where, as with the NSA eavesdropping, he acts contrary to a federal statute. Further, that case invalidated a seizure of private property (with just compensation) a vastly less troublesome invasion of civil liberties than the NSA's indefinite interception of international conversations on Mr. Bush's say so alone.

Congress should insist the president cease the spying unless or until a proper statute is enacted or face possible impeachment. The Constitution's separation of powers is too important to be discarded in the name of expediency.

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…unlimited?

By Bruce Fein

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According to President George W. Bush, being president in wartime means never having to concede co-equal branches of government have a role when it comes to hidden encroachments on civil liberties.

Last Saturday, he thus aggressively defended the constitutionality of his secret order to the National Security Agency to eavesdrop on the international communications of Americans whom the executive branch speculates might be tied to terrorists. Authorized after the September 11, 2001 abominations, the eavesdropping clashes with the Foreign Intelligence Surveillance Act (FISA), excludes judicial or legislative oversight, and circumvented public accountability for four years until disclosed by the New York Times last Friday. Mr. Bush's defense generally echoed previous outlandish assertions that the commander in chief enjoys inherent constitutional power to ignore customary congressional, judicial or public checks on executive tyranny under the banner of defeating international terrorism, for example, defying treaty or statutory prohibitions

on torture or indefinitely detaining United States citizens as illegal combatants on the president's say-so.

President Bush presents a clear and present danger to the rule of law. He cannot be trusted to conduct the war against global terrorism with a decent respect for civil liberties and checks against executive abuses. Congress should swiftly enact a code that would require Mr. Bush to obtain legislative consent for every counterterrorism measure that would materially impair individual freedoms.

The war against global terrorism is serious business. The enemy has placed every American at risk, a tactic that justifies altering the customary balance between liberty and security. But like all other constitutional authorities, the war powers of the president are a matter of degree. In Youngstown Sheet & Tube v. Sawyer (1952), the U.S. Supreme Court denied President Harry Truman's claim of inherent constitutional power to seize a steel mill threatened with a strike to avert a steel shortage that might have impaired the war effort in Korea. A strike occurred, but Truman's fear proved unfounded.

Neither President Richard Nixon nor Gerald Ford was empowered to suspend Congress for failing to appropriate funds they requested to fight in Cambodia or South Vietnam. And the Supreme Court rejected Nixon's claim of inherent power to enjoin publication of the Pentagon Papers during the Vietnam War in New York Times v. United States (1971).

Mr. Bush insisted in his radio address that the NSA targets only citizens "with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist organizations."

But there are no checks on NSA errors or abuses, the hallmark of a rule of law as opposed to a rule of men. Truth and accuracy are the first casualties of war. President Bush assured the world Iraq possessed weapons of mass destruction before the 2003 invasion. He was wrong. President Franklin D. Roosevelt declared Americans of Japanese ancestry were security threats to justify interning them in concentration camps during World War II. He was wrong. President Lyndon Johnson maintained communists masterminded and funded the massive Vietnam War protests in the United States. He was wrong. To paraphrase President Ronald Reagan's remark to Soviet leader Mikhail Gorbachev, President Bush can be trusted in wartime, but only with independent verification.

The NSA eavesdropping is further troublesome because it easily evades judicial review. Targeted citizens are never informed their international communications have been intercepted. Unless a criminal prosecution is forthcoming (which seems unlikely), the citizen has no forum to test the government's claim the interceptions were triggered by known links to a terrorist organization.

Mr. Bush acclaimed the secret surveillance as "crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies." But if that were justified, why was Congress not asked for legislative authorization in light of the legal cloud created by FISA and the legislative branch's sympathies shown in the Patriot Act and joint resolution for war? FISA requires court approval for national security wiretaps, and makes it a crime for a person to intentionally engage "in electronic surveillance under color of law, except as authorized by statute."

Mr. Bush cited the disruptions of "terrorist" cells in New York, Oregon, Virginia, California, Texas and Ohio as evidence of a pronounced domestic threat that compelled unilateral and secret action. But he failed to demonstrate those cells could not have been equally penetrated with customary legislative and judicial checks on executive overreaching.

The president maintained that, "As a result [of the NSA disclosure], our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk." But if secrecy were pivotal to the NSA's surveillance, why is the president continuing the eavesdropping? And why is he so carefree about risking the liberties of both the living and those yet to be born by flouting the Constitution's separation of powers and conflating constructive criticism with treason?